

88-224

NO. _____

Supreme Court, U.S.

FILED

AUG 31 1988

JOSEPH E. SPANIO, JR.

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MICHAEL T. HULL,

Petitioner

vs.

ATTLEBORO SAVINGS BANK,
ET AL.,

Respondents

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI IN
BEHALF OF EDWARD J. CASEY,
MARIA Y. CASEY and EDWARD F. CASEY

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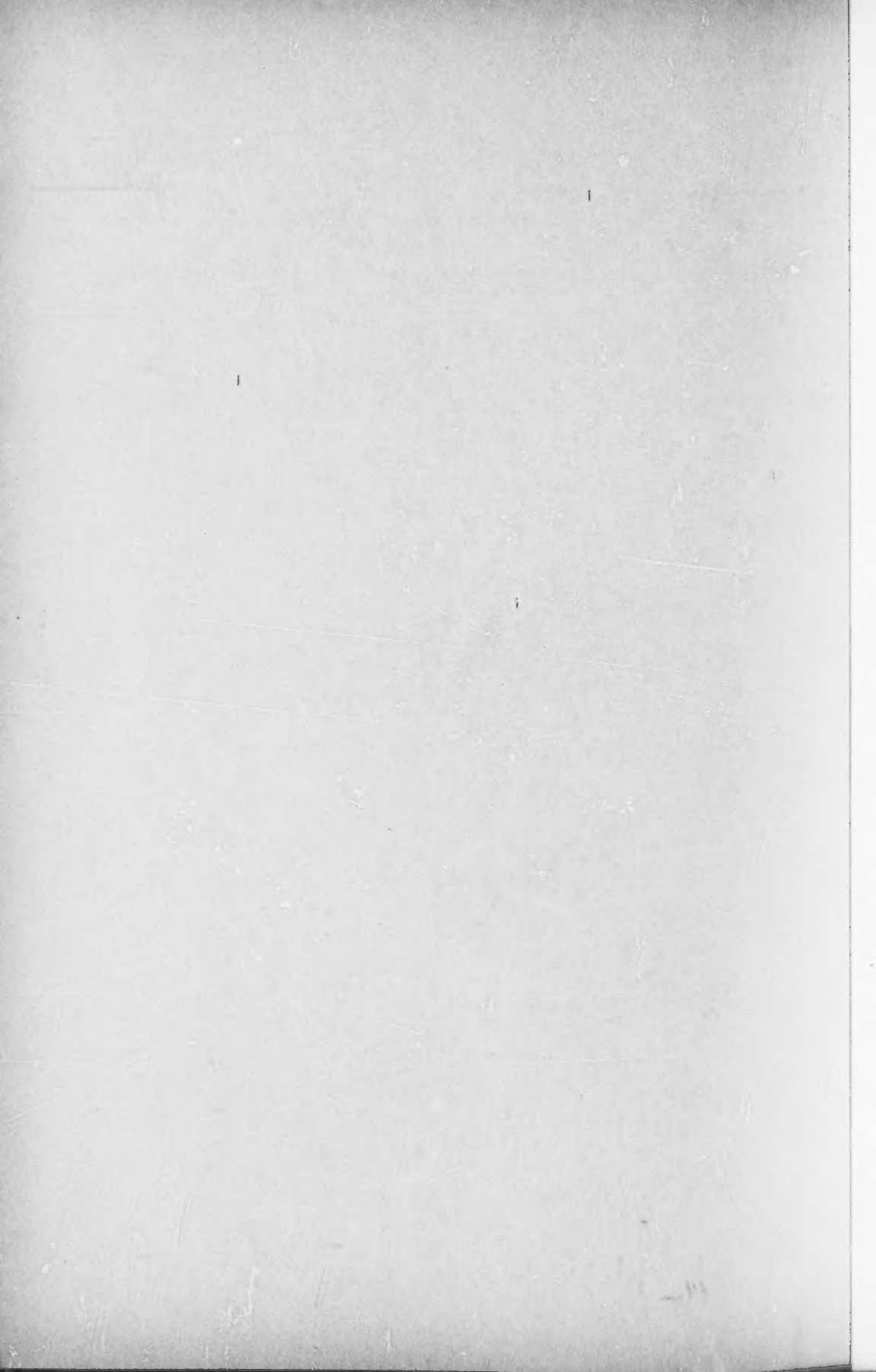


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(i)

Statutes and Authorities

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Cases:

Burton v. Wilmington Parking
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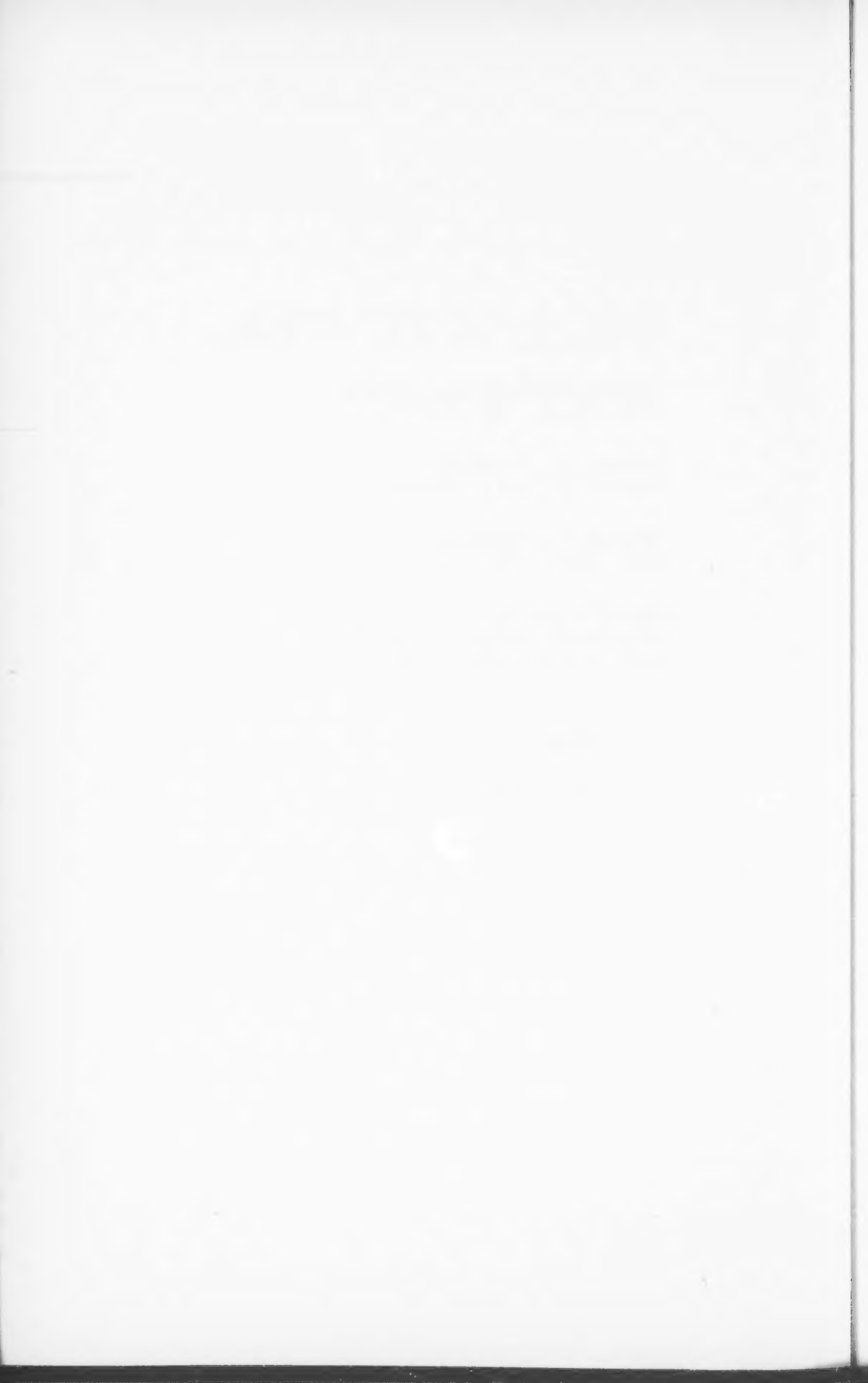
Covey v. Somers,
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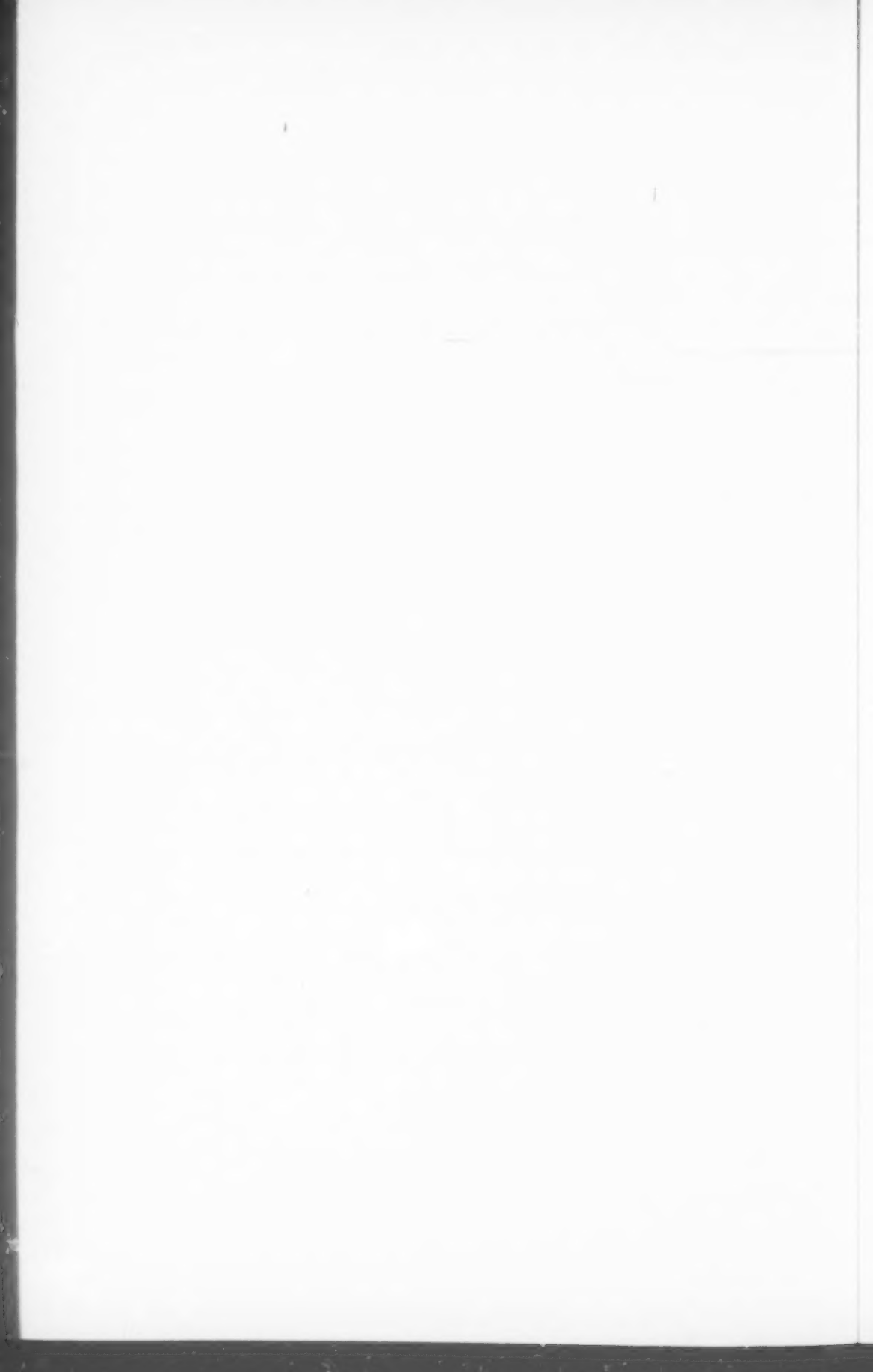
COUNTERSTATEMENT

1. Petitioner is an attorney who filed the original action in his own behalf. (Appendix C-9) The respondents are private citizens and a private bank. Respondents Edward J. Casey, Maria Y. Casey, and Edward F. Casey purchased the property in question from the purchaser at the foreclosure sale, some eight months after the foreclosure sale. The only issue raised in this Court is the claim of a constitutional violation of due process on the theory that the respondent Bank violated due process by failing to have a guardian appointed for the allegedly incompetent petitioner at the time of the foreclosure.

The petitioner further argues that there ought to be no requirement that the respondent Bank must have knowledge of the alleged incompetence, and even if



there is a requirement of knowledge, that the burden of proof of the absence of knowledge should be on the respondent Bank.



REASONS FOR DENYING THE WRIT

1. The Petitioner has failed to establish any state action and therefore the constitutional claim of a lack of due process is not applicable.

In this case, it is undisputed that the respondents are private citizens and a private Bank. Clearly, these respondents are not associated with nor do they represent any government or governmental agency. The petitioner has not even attempted to establish state action, but merely assumed it. Petitioner's reliance on Covey v. Somers, 351 U.S. 141 (1956) is without any merit. In Covey, supra, the defendant Town of Somers was a municipality in the state of New York. Obviously, in that case state action was not in dispute.

Where private parties have allegedly violated constitutional rights, the



petitioner has a much more difficult burden. He must establish that the State has become involved in the conduct to a significant extent. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). This Court has said that it is only when the State so far insinuates itself into a position of interdependence that it becomes a joint participant, or where private conduct becomes so intertwined with governmental policies that a constitutional violation occurs. Evans v. Newton, 382 U.S. 296 (1966).

In this case, there are no governmental policies at work. The State has no interest in the outcome of this private dispute. The only involvement that the petitioner can possibly claim is that the respondent Bank used the court processes to protect any person's interest under the Soldiers and Sailors



Act, 50 U.S.C. App. Section 532. The Soldiers and Sailors Act has no bearing on the foreclosure process. It is merely a method of establishing clear title. In fact, the respondent Bank foreclosed on the mortgage by entry on the premises as provided by state law and subsequent sale by foreclosure.

The use of the court system to enable the private bank to clear the marketable title hardly measures up to joint participation, intertwined state policies, etc. It is obvious that the state had no interest in this matter, and played no role in the foreclosure.

For that reason alone, the petition for the writ ought to be denied. (Cf. Matter of Will of Cram, Supreme Court of Montana, 606 P.2d. 145 (1980).)

2. Knowledge of incompetency by the party taking possession of the



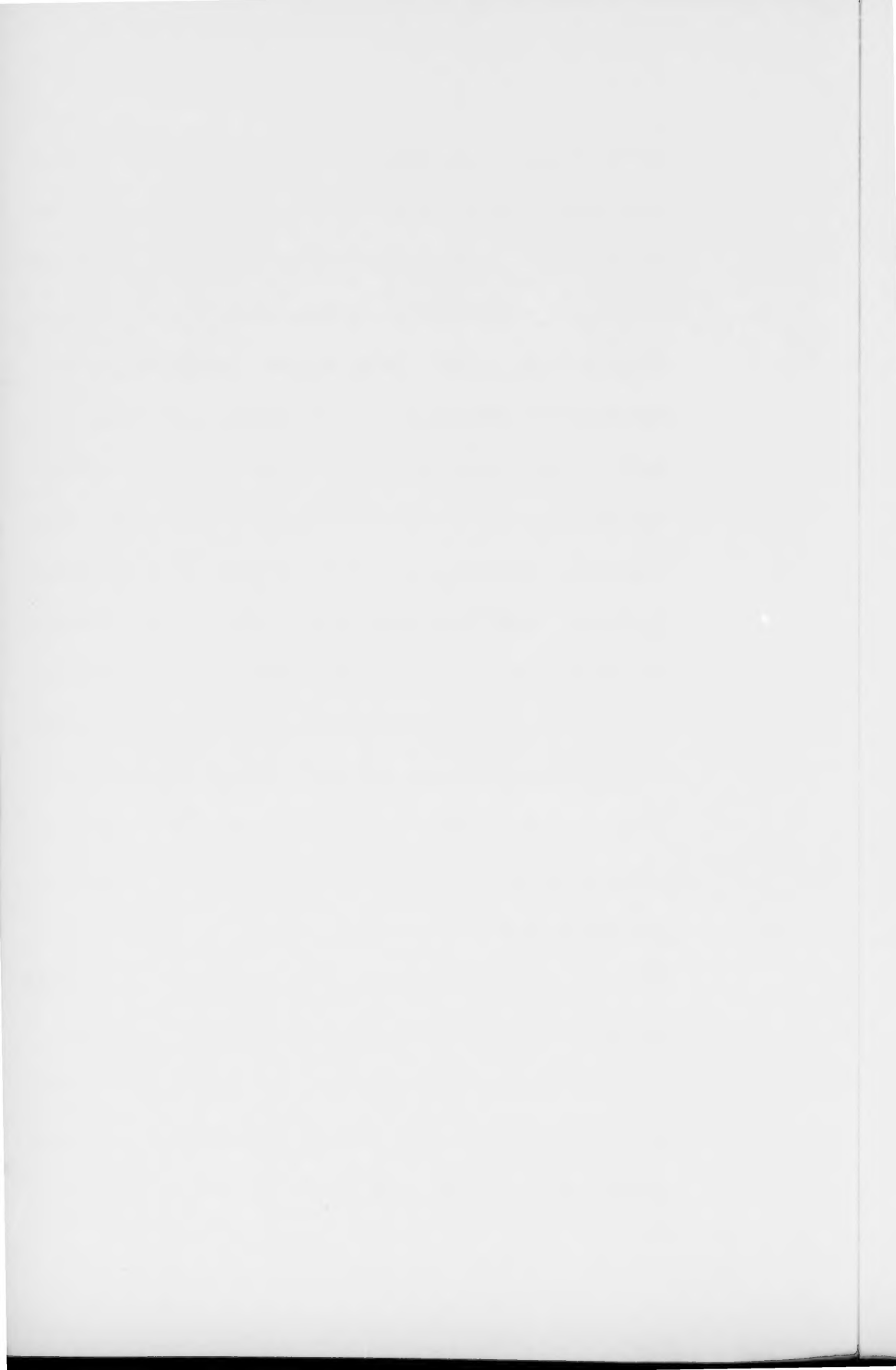
property is a prerequisite to any claim of due process violation based upon ineffective notice, and proof of same is upon the petitioner.

In Covey v. Somers, supra, this Court stated that if the Town knew that the person was incompetent, the Town must provide whatever necessary notice is required so that the incompetent's rights to redeem or file an answer would be protected. The Court stated that the claimant had been incompetent for 15 years and was wholly unable to comprehend the notice of the proceedings against her. Clearly, such facts demand judicial intervention.

However, in this case, the petitioner is a lawyer, who claims that it was known that he was acting in an "erratic" and "bizarre" manner, people could not work with him, he was admitted

to a facility, and that he had financial and emotional problems. He claimed to be suffering from depression and involved in drugs. Before entering the above facility, he admitted seeking and obtaining permission to enter his home to get his clothing. None of these allegations compare with those in the Covey case. In fact, as the Massachusetts Supreme Judicial Court pointed out, in Commonwealth v. Olivo, 369 Mass. 62 (1975), notice is sufficient if a person even though under disability receives notice that would put a reasonable person on notice that inquiry is required, and the party's disability does not render him incapable of understanding the need for such inquiry.

In this case, the petitioner is an attorney. He knew enough to seek permission from the Bank to enter the

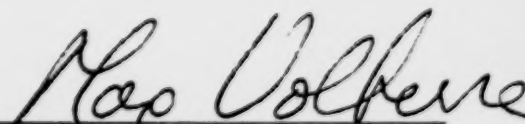


home in question and remove his clothes. He was not institutionalized other than by his own volition for a short time. Clearly, this claim of due process violation does not measure up to the facts set forth in the Covey case.

With respect to the burden of proof, it has long been the law that the party making a claim ought to carry the burden of proving that claim. This case is no different.

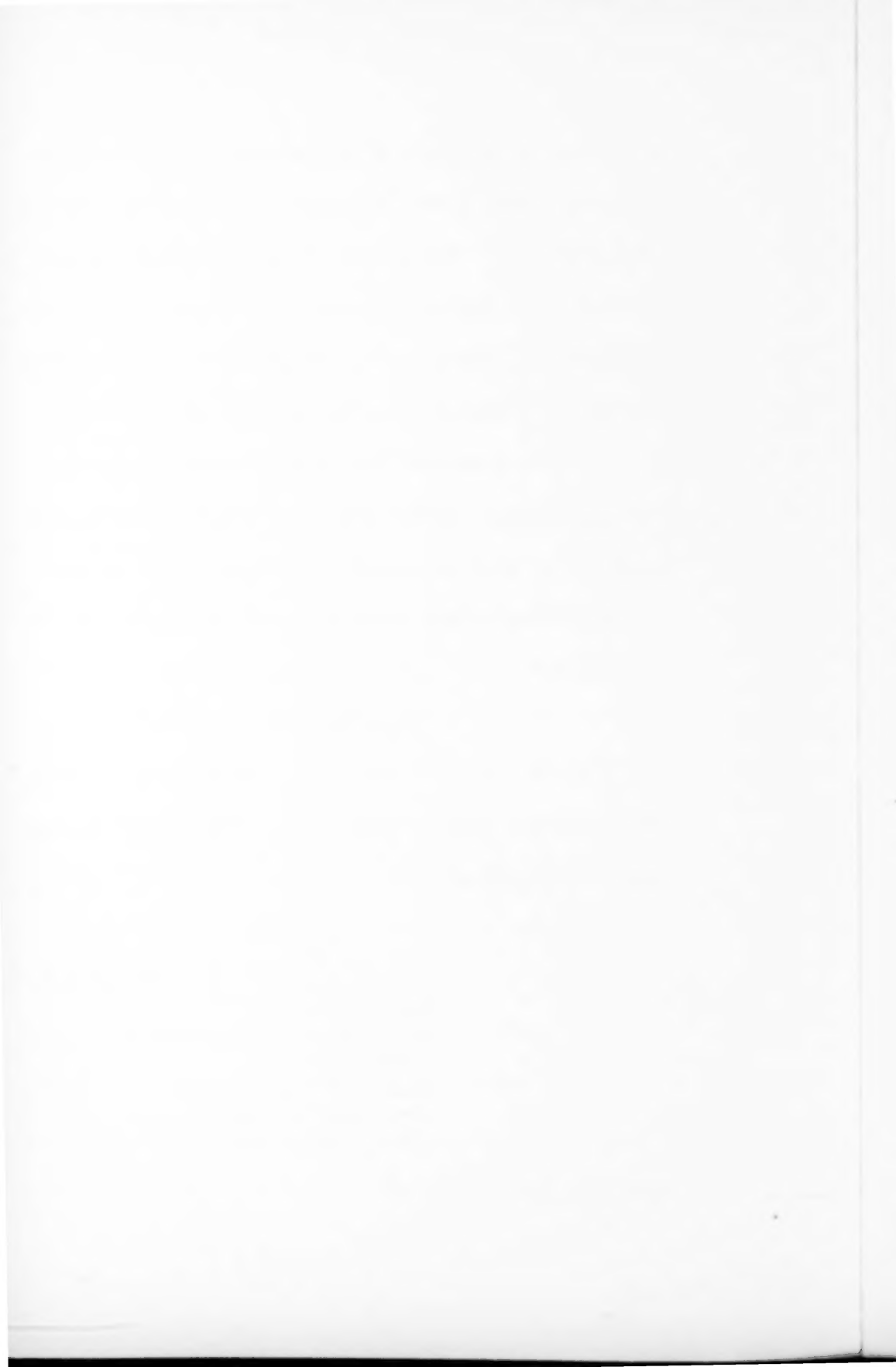
CONCLUSION

For all these reasons, the defendants Casey say that the Writ ought not be granted.



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August 29, 1988

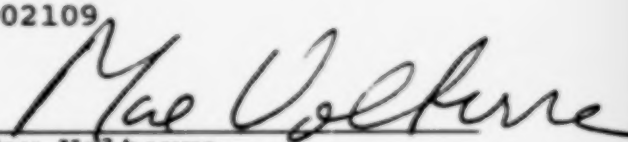


CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing "Brief in Opposition to Petition for a Writ of Certiorari in Behalf of Edward J. Casey, Maria Y. Casey, and Edward F. Casey" upon counsel for all parties by placing three copies thereof in the United States mail, first-class postage prepaid, properly addressed, to each of the following attorneys for said parties:

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